No. 10389

In the United States Circuit Court of Appeals for the Ninth Circuit

CONSOLIDATED AIRCRAFT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

550598—43——1

Cases—Continued.

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JURISDICTION

This case is before the Court upon petition of Consolidated Aircraft Corporation to review and set aside an order issued against it by the National Labor Relations Board pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*), herein called the Act. In its answer to the petition the Board has requested enforcement of its order. Petitioner, a Delaware corporation, has its principal office and manufacturing plant at San Diego, California, within this judicial circuit, where

the unfair labor practices occurred. The jurisdiction of this Court is based upon Section 10 (e) and (f) of the Act.

STATEMENT OF THE CASE

Following the usual proceedings, which are set forth in the Board's decision (R. 90–93), the Board, on February 18, 1943, issued its findings of fact, conclusions of law, and order (R. 89–120) which may be briefly summarized as follows:

1. *Nature of petitioner's operations.*—Petitioner is engaged in the manufacture of aircraft, aircraft parts, and accessories at its San Diego, California, plant. During 1941 it purchased materials and supplies valued in excess of $5,000,000, more than one-half of which were shipped to it from points outside California, and sold finished products valued in excess of $95,000,000, substantially all of which it delivered to points outside that State (R. 94).[1]

2. *The unfair labor practices.*—By repeated unilateral action in respect to wages, hours, and working conditions in disregard of and without notice to or consultation with the Union,[2] the duly authorized representative of its employees, and by threats, warnings, and hostile restrictions on Union membership and activity, petitioner has interfered with, restrained,

[1] At the hearing these facts were stipulated and petitioner conceded that it was engaged in commerce within the meaning of the Act (R. 143–144).

[2] International Association of Machinists, Aircraft Lodge #1125, affiliated with the American Federation of Labor at the time the unfair labor practices occurred.

and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. 117).

3. *The Board's order.*—The order requires petitioner to cease and desist from its unfair labor practices and to post appropriate notices (R. 119).

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found petitioner has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

II. The Board's order is valid and proper.

ARGUMENT

Point I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found petitioner has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

Following an election in which it was successful, the Union was certified by the Board on August 3, 1938, as the exclusive representative of petitioner's hourly rated employees, excluding timekeepers and superintendent's clerks.[3] On June 12, 1941, petitioner and the Union entered into a collective labor agreement which, as amended, was in force when the unfair labor

[3] *Matter of Consolidated Aircraft Corporation*, 8 N. L. R. B. 205. Petitioner does not contest the Union's continued majority status, and no question is presented as to the validity of the certification.

practices occurred.[4] Notwithstanding the Union's representative status and the existence of the contract, petitioner has repeatedly interfered with its employees' exercise of their "continuous right to maintain labor organizations for the purpose of collective bargaining" which the Act secures to them "after the signing of a particular collective bargaining agreement as well as before." (*N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 267 (C. C. A. 3)). Petitioner's interference, which the Board found to constitute violation of Section 8 (1) of the Act, was of two general types. In the first place, petitioner repeatedly, without prior notice to or consultation with the Union, took unilateral action with respect to conditions of employment which were appropriate subjects of collective bargaining. Secondly, petitioner has imposed unwarranted restrictions upon Union membership and activity and upon employees' performance of their duties as Union committeemen.

A. Petitioner's interference with employees' rights under the Act by unilateral disposition of matters which were appropriate subjects of collective bargaining

1. *Petitioner's suspension and resumption of interim individual wage increases.*—The contract of June 12, 1941, provided that general wage reviews should be conducted in April and October of each year by joint committees representing both petitioner and the Union, and that during the periods between general wage reviews, petitioner would approve individual merit wage

[4] The contract is for the term of 2 years or for the period of the national emergency proclaimed by the President. It was amended on October 18, 1941, and March 5, 1942 (R. 159–160).

increases in accordance with its past practice and after consultation with the foreman and the union committeemen involved (R. 149–150). On November 11, 1941, while these contractual provisions were in effect, and without any notice to or consultation with the Union, Works Manager I. M. Laddon announced to all petitioner's department heads that there would be no individual increases in the period between the October 1941 wage review, then in progress, and the next general wage review which was to take place in April 1942 (R. 459–461, 464). After the Union protested, petitioner announced the resumption of the practice of granting interim individual increases (R. 221–222, 288–289, 452, 461). Even then, however, petitioner persisted in treating the grant of increases as if it lay in its sole uncontrolled discretion, notwithstanding past practice and the contractual requirement of previous consultation. Thus, in the spring of 1942 petitioner put into effect several hundred such increases without consultation with the union committeemen concerned, although the contract provided that increases should be granted only after such consultation (R. 222–223, 229–230, 797). The Union twice objected to this practice without success (R. 219–220, 223, 230). Finally petitioner agreed to resume consultation with the union committeemen before granting increases (R. 228, 230, 253–255, 527), but as to the many increases given in disregard of the Union "the damage was done," as the Union representatives recognized (R. 230, 527, 543–544), for the Union was thereby discredited in the eyes of the employees who had been granted increases without its help.

550598—43——2

When petitioner abruptly terminated the interim wage procedure provided by its contract without consulting the other party to that contract, it plainly interfered with its employees in their right to have their representative acknowledged after, as well as before, the execution of the contract. Yet petitioner, after agreeing to abide by the contract's provisions and reinstate the practice of reviewing individual wages between the general reviews, nevertheless put these increases into effect without ever approaching the union committeemen, although the contract specifically provided that they be consulted before such action should be taken (*supra,* pp. 4–5). When the Union protested this second disregard of its status as representative of the employees, the Company offered to retract the increases (R. 230, 526). Such action would only have served to emphasize the undermining of the Union's prestige already accomplished when the increases were announced to their recipients without prior consultation with the committeemen (R. 230, 543–544). This entire incident clearly constituted interference with Consolidated's employees in their right to be dealt with through their designated representative.

Petitioner's suspension and subsequent resumption of interim wage increases without previous notice to or consultation with the Union marked the beginning of a series of incidents in which petitioner acted unilaterally upon matters of general concern to its employees in disregard of their representative. We shall discuss these *seriatim.*

2. *The petitions and the notice of December 13, 1941.*—The contract of June 12, 1941, provided for double-time payment for work on the seventh consecutive day (R. 430). San Diego was blacked out on the night of December 10, 1941, and the night shift lost some time (R. 654, 835). Certain night shift employees signed a petition on December 11, volunteering to do daytime work painting out the plant skylights and reflecting surfaces so that work might continue without further loss of man hours in any future blackouts (R. 788–795). On Saturday, December 13, petitioner posted notices which, after accepting the volunteers' offer to paint, went on to state that "other employees who signify in writing that they desire to work Sunday at time and one-half will ring their time cards and be paid accordingly" (R. 339).[5] Since the

[5] The whole notice was as follows:

NOTICE TO ALL EMPLOYEES

> In line with President Roosevelt's desire for a 7 day week, those employees who volunteered to work Sunday without pay may do so. Those men are not to ring their time cards. Other employees who signify in writing that they desire to work Sunday at time and one-half will ring their time cards and be paid accordingly. The above applies to certain jobs in Jigs and Fixtures, Tool Room, Machine Shop, Fuselage, Paint Shop, Sheet Metal, Welding, and blackout painting. No other departments will work.

The reference to "President Roosevelt's desire for a 7-day week," unexplained in the record, evidently relates to the President's speech of December 9, 1941, in which he recommended "working on a 7-day-week basis in every war industry." *New York Times*, December 10, 1941, p. 4. It is clear that the 7-day week mentioned referred to maximum use of plant facilities, rather than to the workweek of employees. See the statement of

employees to whom the notice was addressed were regularly working a 6-day week from Monday through Saturday, the Sunday referred to was the seventh consecutive day of work, for which the contract required double pay (R. 430). Petitioner's notice was obviously a direct appeal to the employees to forego their rights under the contract and consent to a waiver or modification of its provisions. On the same day, in response to petitioner's invitation, petitions bearing the language "In view of the present war situation we, the undersigned, offer to work this Sunday at time and a half" appeared and, with petitioner's assistance, were circulated among employees on both the day and night shifts (R. 417–418, 553). Thus, although the petition of December 11 concerning blackout painting by night shift workers may have been spontaneous,[6] petitioner did more than accept the proffered assistance; it solicited other employees to perform their regular work on the seventh consecutive day at a wage less than that previously fixed by collective bargaining. Petitioner's direct dealing with

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William S. Knudsen, then Director General of the Office of Production Management, *New York Times*, December 11, 1941, p. 1, col. 4. The Executive Order of October 1, 1942, states that "the continous operation of plants and machines in prosecuting the war does not require that employees should work seven consecutive days," and provides that "where because of emergency conditions an employee is required to work for seven consecutive days in any regularly scheduled workweek a premium wage of double time compensation shall be paid for work on the seventh day." 11 L. R. R. 34, 7 Federal Register 7159, 7160.

[6] Cf. *N. L. R. B.* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, 281 (C. C. A. 2).

the employees in disregard of their representative was in violation of the Act.[7]

When Foremen Stark and Watt informed Manager Newman of the parts plant that Fisher, union committeeman in that plant, was advising employees not to sign the December 13 petitions, Newman asked Fisher whether he was a "slant-eyed Jap lover, a Hitlerite, or a God-damned Communist," and warned him that he was "treading on thin ice" and that at "the first of the year" he would be "all done" (R. 342, 383, 836–838).[8]

The employees who worked on Sunday, December 14, were subsequently paid at the contract rate, but only after petitioner had first rejected the Union's request for compliance with the contract and characterized union representatives as disloyal, "unpatriotic," and "un-American" for opposing petitioner's arbitrary action (R. 462, 497–500, 502–505, 553).

Petitioner admits that it acted unilaterally and seeks to excuse its conduct by reference to the war emer-

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[7] *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 353; *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. (2d) 676, 681 (C. C. A. 9); *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22 (C. C. A. 9); *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 870 (C. C. A. 2); *N. L. R. B.* v. *Martin Bros. Box Co.*, 130 F. (2d) 202, 204 (C. C. A. 7), and cases cited therein; *N. L. R. B.* v. *Superior Tanning Co.*, 117 F. (2d) 881, 885–888 (C. C. A. 7); *N. L. R. B.* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2).

[8] Fisher was in fact discharged on January 1, 1942. His discharge was alleged as an unfair labor practice in the complaint, but the Board in its discretion dismissed this allegation of the complaint without prejudice because the discharge had not been submitted to arbitration under the union contract (R. 112).

gency. But the contract of June 12, 1941, negotiated when war was within the contemplation of the parties,[9] recognized the possibility of seventh day work and fixed the rate at which employees should be paid for it (R. 152). So far as appears in the record there was nothing in the emergency which required the abandonment of petitioner's established wage standards. In any event, the emergency certainly did not require petitioner to circumvent the Union by direct appeal to the employees.

3. *The third shift.*—The contract of June 12, 1941, provided that the work week should consist of 40 hours of 5 consecutive days from Monday through Friday (R. 151). Time and one-half was to be paid for 8 hours of Saturday work and double time thereafter (R. 152). In March 1942 petitioner instituted a third working shift after conferences with the Union had established that third-shift workers would receive the 8-cent hourly differential payable to second-shift employees and in addition would be paid 8 hours pay for 6½ actual working hours (R. 549). During the conferences nothing was said concerning the days of the week to be worked by the third shift, which in the absence of amendment to the contract, should work the regular week of 5 consecutive days from Monday through Friday, with Saturday and Sunday to be paid at time and one-half and double time, respectively, if worked (R. 151–152, 234–235,

[9] See Section 22 on military service of employees (R. 157–158), and Section 25, by which the contract is to run for the period of the unlimited national emergency (R. 159).

549). On March 9, however, petitioner issued an order, without notice to the Union, establishing the third shift to run from midnight Monday to 7 o'clock Sunday morning (R. 606, 808). In consequence of petitioner's unilateral promulgation of the third shift work week different from that established by the contract, the parties have since had a controversy, which is as yet unresolved, over the rate of pay for that portion of the third shift work week which falls on Sunday (R. 235–237, 267–268, 512–519).

4. *The job classifications.*—The contract amendment of March 5, 1942, provided for reviews, by committees representing both petitioner and the Union, of the wages of all employees after 6 months' service (R. 149, 160). When the wage rates of individuals were subsequently discussed by these joint committees, petitioner's representatives repeatedly refused to consider increases for particular employees on the ground that they were already receiving the maximum rates for their particular jobs under a schedule of job classifications which petitioner had unilaterally established for the "guidance" of its representatives and to serve as a "yardstick" to govern rates of pay (R. 237–238, 304, 320, 797–798). When the Union asked to negotiate about these classifications, petitioner's labor relations director refused to do so (R. 237–238, 241, 304–309). The Union repeated its request by letter on May 1, 1942, but petitioner made no reply (R. 520–523), and it even refused to disclose to the Union the job classification schedule upon which petitioner's representatives continued to rely in wage review nego-

tiations (R. 240–241, 308–309).[10] Although this job classification scheme has imposed a real limitation on the functioning of the wage reviews provided by the contract, petitioner has persisted in subjecting the employees to its sole determination on this important matter affecting their jobs and earnings (R. 241).

Petitioner asserts by way of justification for its establishment and use of the job classification schedule that it merely adopted a schedule uniform to the Southern California aircraft industry (R. 797–798, 803). That is obviously no answer, for regardless of the desirability of uniformity, nothing would have prevented petitioner from disclosing it to and discussing it with the Union before its adoption, or from discussing its application thereafter; at least two other aircraft manufacturers who adhered to the schedule discussed it with their employees' representatives before adopting it (R. 806–808).[11]

Petitioner also contends that the whole matter of job classifications in the California aircraft industry has now been removed from the area of collective bargaining and referred to the National War Labor

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[10] The employer's refusal to disclose upon request the job information necessary for wage negotiation is a breach of the duty to bargain (*Aluminum Ore Co.* v. *N. L. R. B.*, 131 F. (2d) 485, 487, (C. C. A. 7)) and hence is a violation of Section 8 (1) (*N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 433).

[11] "In the California airframe industry, since the summer of 1941, there has been some collective bargaining between management and workers * * * on the subject of job classification * * *" *Matter of West Coast Airframe Companies, et al.*, National War Labor Board Cases Nos. 174 et al., decided March 3, 1943, p. 4 of pamphlet opinion.

Board for determination (R. 85–86). Even if that were true, it would not excuse petitioner's unilateral action at a time when job classifications were subject to collective bargaining. But the fact is that the procedures of the National War Labor Board do not supersede the right of collective bargaining[12] and that, in dealing with aircraft industry job classifications, that Board has made due provision for continued collective bargaining. *Matter of West Coast Airframe Companies, et al.,* National War Labor Board Cases Nos. 174, et al., March 3, 1943.[13]

Petitioner further contends that the National War Labor Board has, subsequent to the hearing in the instant case, given exclusive jurisdiction over job classifications and wage schedules in this industry to the West Coast Aircraft Committee, thus depriving the Board of jurisdiction in this matter. These contentions rest on a mistaken concept of the gravamen of the violation which the Board has found and the repeti-

[12] Section 7 of the Executive Order of January 12, 1942, under which the National War Labor Board functioned during the period in question, provided that "Nothing herein shall be construed as superseding or in conflict with the provisions of * * * the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 457; U. S. Code 151 *et seq.*) * * *" 7 Federal Register 238, 9 L. R. R. 536.

[13] The opinion in the above case states that in directing the establishment of a job classification schedule, "realizing that [it] is no more than a broad initial step toward rationalization and stabilization of the wage structure in these plants [including petitioner's] and further realizing that any job classification system is properly subject to reasonable modification by collective bargaining in the light of experience, particularly in a rapidly expanding industry, the [National War Labor] Board has allowed for such collective bargaining * * *," p. 4 of pamphlet opinion.

tion of which it seeks to prevent. It is not contested that petitioner was fully entitled to take and maintain forcefully its position on these issues. It is submitted, however, that petitioner, by imposing its position unilaterally without prior consultation with, or even information to, the Union with regard to these numerous matters in which the Union had been designated to represent the employees, has consistently disparaged their representative in the eyes of those employees. Thus petitioner has prevented them from being truly represented for collective dealings, despite its lip service to such representation by signing the contract.

The Board does not require in its order that petitioner take any specific action as to any of these episodes. However, it does find that petitioner has repeatedly interfered with, restrained, and coerced its employees in the full representation by their certified representative to which they were entitled. It is a continuation or repetition of that course of conduct which the Board's order is designed to prohibit.

5. *The employees hired outside California.*—Because of the labor shortage in the area of its operations, petitioner hired a number of employees outside the State of California at agreed rates and job classifications. Upon their arrival in San Diego, petitioner reduced the wages or job classifications of 21 or 22 of them without previous notice to or consultation with the Union which represented them (R. 286–287, 321–322, 797). When the Union sought to take up these cases as grievances, Labor Relations Director Wiseman refused to take any action on them (R. 289–290). It was not until after intervention by a Department

of Labor Conciliator that petitioner reconsidered its action and made a compromise adjustment of these cases (R. 291–304, 803–804).

6. *The crane operators.*—The contract between petitioner and the Union does not contain a complete wage scale. In its original form the contract fixed only a minimum hiring wage of 60 cents an hour, to rise automatically to 75 cents after the twelfth week of service (R. 427–428). During the April 1941 wage review, a minimum rate of 75 cents was established for crane operators (R. 231). Thereafter, two general wage increases were negotiated, one of 5 cents effective May 3, 1941, and another of 13 cents, retroactive to August 9, 1941 (R. 231, 429). According to the Union's contention, these increases should have brought the crane operators' minimum up to 93 cents, but petitioner continued to hire crane operators and transfer others to that work at less than the 93-cent rate. When union representatives sought at a conference early in February 1942 to adjust the pay of newly hired and transferred crane operators upward to equal that of the others, petitioner's representatives insisted on the 60 to 75 cent minimum of the contract and took the position that they would not agree to any base rate of pay for crane operators (R. 232–234). When the Union wrote Wiseman on February 21, asking him to name arbitrators to resolve this controversy in accordance with contract procedure, he did not reply (R. 454–455). Subsequently, when the Union repeated its request, Wiseman replied that petitioner had nothing to arbitrate and that the management regarded the matter as entirely irrelevant

and was not going to consider it (R. 455–456). Later, after a Department of Labor Conciliator intervened, the wage rates of the individual crane operators then involved were adjusted, but it does not appear that petitioner has receded from its determination not to agree to any base rate for crane operators (R. 233, 263, 456–457).

B. Conclusions as to petitioner's interference by unilateral action

That petitioner's conduct in all these instances constituted interference, restraint, and coercion of its employees in their right to bargain collectively through representatives of their own choosing, and thus constituted a violation of Section 8 (1) of the Act, becomes clear upon examination of the customary contractual relationship between an employer and a union designated by its employees. It is therefore useful briefly to consider this relationship

The signing of a collective agreement is but a preliminary move in the direction of industrial peace. "The written contract is a general constitution upon which a body of industrial law is built."[14] Its provisions are elaborated and changed by the settlement of grievances and of controversies concerning its interpretation whereby a body of industrial common law is evolved. Thus, a contract is only the first step in the bargaining process. It cannot possibly dispose with finality of all matters relating to wages, hours, and working conditions which may give rise to work

[14] Golden, Clinton S., and Harold J. Ruttenberg, *The Dynamics of Industrial Democracy*. New York and London [1942], pp. 43, 82–118.

stoppages. After its signing the employer must continue to deal in good faith with the established representative in order to maintain peaceful industrial relations. If he fails in this duty, the signing of a contract becomes merely a device whereby employees who have designated their agent for dealing in issues arising out of the employment relationship are in fact deprived of such representation. "The attempt to undermine the new unions often continues even after employers have signed agreements with them." [15] The very nature of the aviation industry prevents the incorporation into the contract of all possible points of controversy. As a complex, new, and rapidly expanding industry, it is not one in which bargaining procedures are established. Accordingly, the industrial "common law" which grows up through the handling of grievances and the interpretation of contracts is not stabilized but is still in the making. Even job classifications and wage scales are elastic in this industry.[16] This is apparent from the provisions of the instant contract for general wage reviews by joint committees and interim wage reviews after joint consultation (*supra,* pp. 4–5). These provisions of necessity look to post-contract bargaining between the Company and the Union.

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[15] Slichter, Sumner H., *Labor Aspects of the National Recovery Administration*, in *Current Economic Policies* (ed. by Joseph B. Hubbard), 1934, pp. 344–345.

[16] "One of the union's chief aims in this industry has been to reduce the number of job classifications and to equalize rates for the same work." The Twentieth Century Fund. *How Collective Bargaining Works.* New York [1942], pp. 930–931.

By reason of these circumstances, employees, in selecting a union as their representative, designate it as their agent not only to negotiate and execute a contract, but also to represent them in interpreting and carrying out that contract. The Supreme Court has recognized that even after a contract has been entered into "the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning" (*N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332, 342). Nor is there anything in the Act "to indicate that its framers intended that its force should be expended after it had once operated to cause an employer to bargain collectively with his employees," and, had Congress intended that the duty to bargain collectively should be limited to the term of the contract, "it would have so provided in clear and specific terms" (*N. L. R. B.* v. *Highland Shoe, Inc.*, 119 F. (2d) 218, 222 (C. C. A. 1)).

Unrest and stoppages frequently result from circumvention of the employees' agent by an employer who, overlooking the fact that "in a free society the desire of individuals to participate in the things that are important to them is an inviolate principle of human relations," unilaterally disposes of matters within the scope of the Union's agency.[17]

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[17] Golden and Ruttenberg, *op. cit.*, p. 82.

"* * * This practice on the part of employers of refusing to recognize their workers as collective units whether organized or not, and of simply posting notices of changed conditions without

This Court and others have frequently held employers to have violated the Act by disposing unilaterally of issues within the sphere of those activities in which Section 9 (a) entitles their employees to participate through their representatives.[18] It cannot be questioned that the matters here involved fall within that sphere.[19]

Petitioner seeks to justify its unilateral action in all these matters on the ground that: "The Company had entered into a bargaining agreement. The management was justified in taking a position as to the interpretation of the agreement, and in announcing its po-

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previous efforts at negotiation or parley, and then showing surprise and grief when a strike occurs, is one of the most insincere exhibitions in modern industrial relations. And it is very common. It suggests either that the employers have no concern for their own interest and no understanding of the importance of worker morale or that they are convinced in advance that nothing can be gained by treating human beings as such. In these circumstances a strike may be a mistake from an economic point of view but on another plane it is the only dignified thing to do." Ware, Norman J., *Labor in Modern Industrial Society.* Boston, 1935. p. 115.

[18] *N. L. R. B.* v. *Grower-Shipper Vegetables Ass'n*, 122 F. (2d) 368, 377, (C. C. A. 9); *N. L. R. B.* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688 (C. C. A. 1); *N. L. R. B.* v. *George P. Pilling & Son Co.*, 119 F. (2d) 32, 36 (C. C. A. 3); *Great Southern Trucking Co.* v. *N. L. R. B.*, 127 F. (2d) 180, 186 (C. C. A. 4); *N. L. R. B.* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5); *N. L. R. B.* v. *Boss Mfg. Co.*, 118 F. (2d) 187, 189 (C. C. A. 7); *Inland Lime & Stone Co.* v. *N. L. R. B.*, 119 F. (2d) 20, 22 (C. C. A. 7); *N. L. R. B.* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 593 (C. C. A. 7); *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. (2d) 452, 458 (C. C. A. 7), cert. denied 317 U. S. 650.

[19] Cf. *Singer Mfg. Co.* v. *N. L. R. B.*, 119 F. (2d) 131, 137 (C. C. A. 7); *Rapid Roller Co. v. N. L. R. B.*, 126 F. (2d) 452, 459 (C. C. A. 7), cert. denied 317 U. S. 650; *Wilson & Co.* v. *N. L. R. B.*, 115 F. (2d) 759, 764 (C. C. A. 8).

sition and in maintaining it in negotiations. The Union could have taken the issue to arbitration but failed to do so." (Brief, p. 30.) The Board agrees that petitioner was entitled to take and maintain vigorously its position on any matter of interpretation of the contract. Its unfair labor practices lay in its failure to discuss its interpretation with the Union, or even to inform the Union of that interpretation before it put into effect its own interpretation of each of these controversial matters by unilateral action. It is this conduct which is the crux of the Board's finding of unfair labor practices and which its order seeks to prevent in the future.

The Board could have concluded that petitioner, by the unilateral acts set forth *supra,* had refused to bargain collectively with the Union within the meaning of Section 8 (5) as the complaint among other things alleged. The Board noted, however, that all but two of the points in dispute between the parties had been in some fashion adjusted and that the Union had not taken steps to submit the remaining two to arbitration under the contract. Although neither the contract as a whole nor its arbitration provisions in any way limited the Board's exclusive jurisdiction over unfair labor practices or its power to grant effective relief,[20] the Board took cognizance of the contract procedure for settlement of disputes in determining whether to exercise to the full the jurisdiction which it clearly possessed. Under the circumstances disclosed, the Board

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[20] Section 10 (a) (29 U. S. C., Sec. 160 (a)); *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 268 (C. C. A. 3).

in its discretion declined to find whether petitioner's whole course of conduct was a refusal to bargain and to make the bargaining order normally predicated upon a finding of such refusal. Accordingly, the Board dismissed the complaint without prejudice insofar as it alleged a refusal to bargain within the meaning of Section 8 (5). The Board could not, however, overlook petitioner's repeated acts of interference with the bargaining process in derogation of the employees' right to deal through their representative. The Board's finding thus extends only to the specific and repeated acts of interference which have prevented the bargaining process and the collective labor agreement from fully achieving their objective of industrial peace. That those acts constitute interference is rendered nonetheless so because the Union has been able, by resort to grievance procedure and mediation, to regain some of the working conditions which petitioner's unilateral action impaired, or because submission of the remaining matters to arbitration might have secured their correction. Where the essence of the wrong is that, without prior notice to or consultation with the employees' representative, the employer has appealed directly to employees and has unilaterally and arbitrarily promulgated conditions of work, it is obvious that the injury is not repaired merely by subsequent consultation or by restoration of the *status quo* as to working conditions after each incident. On the basis of petitioner's repeated unilateral acts (and indeed upon any of them) the Board was fully warranted in concluding, as it did, that petitioner had interfered with, restrained, and coerced its employees within the meaning of Section 8 (1) of the Act.

C. Petitioner's other interference, restraint, and coercion

Petitioner interfered with its employees' rights under the Act not only by the unilateral action described above, but also by opposition to employees' performance of their duties as Union officers and by efforts to procure employees' withdrawal from membership and activity in the Union.

Early in 1940, Henry J. Liegal, then a foreman, told employee Fisher, one of his subordinates, that if it were not for Fisher's union activities Liegal would be able to do something for him toward getting him a job he wanted as leadman on the afternoon shift then being set up (R. 325–326). Fisher was discharged in July 1940 and then, at the instance of a Union representative, reinstated to a job in another department (R. 327–331). Soon after Fisher was elected Union committeeman in January 1941, Powell, his foreman, repeated Liegal's earlier inducement and told Fisher that if he "would quit this union stuff," Powell would see that he was advanced to a better position (R. 331–332, 408–409). These offers of more favorable employment conditioned on Fisher's abandonment of his activity on behalf of the Union constituted the plainest kind of interference with employees' rights under the Act.[21]

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[21] *N. L. R. B.* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *N. L. R. B.* v. *A. S. Abell Co.*, 97 F. (2d) 951, 955 (C. C. A. 4); *Triplex Screw Co.* v. *N. L. R. B.*, 117 F (2d) 858, 860 (C. C. A. 6); *Swift & Co.* v. *N. L. R. B.*, 106 F. (2d) 87, 92 (C. C. A. 10); *N. L. R. B.* v. *Arcade Sunshine Co.*, 122 F. (2d) 964, 965 (App. D. C.), cert. denied, 313 U. S. 566.

When later, as noted (*supra,* p. 19), Fisher, having become chairman of the Union's committeemen, protested the circulation of the December 13, 1941, petitions, Plant Manager Newman accused him of being subversive and threatened his discharge. Both the accusation [22] and the threat [23] were clearly coercive.

Night Superintendent Liegal, who as foreman had previously shown his hostility to Fisher's union activities (p. 22, *supra*) again objected to the efforts of a Union representative to carry out his duties, when in April 1942 employee Williamson, Union night shift committeeman, protested against what he considered unfair treatment of a fellow employee (R. 169–174). While Williamson was expressing his protest Liegal said to him, "You are one of these damned union agitators—you better be careful or you will know what I am going to do to you" (R. 174–175).[24] Although in making his protest Williamson appears to have made

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[22] *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. (2d) 452, 456 (C. C. A. 7), cert. denied 317 U. S. 650; *Reliance Mfg. Co.* v. *N. L. R. B.*, 125 F. (2d) 311, 314 (C. C. A. 7).

[23] *North Whittier Heights Citrus Assn.* v. *N. L. R. B.*, 109 F. (2d) 76, 78 (C. C. A. 9); *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. (2d) 452, 455 (C. C. A. 7), cert. denied 317 U. S. 650; cf. *N. L. R. B.* v. *Freuhauf Trailer Co.*, 301 U. S. 49; *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270.

[24] Williamson was thereupon discharged and his service record marked "Discharged, agitator" (R. 178–179). After a protest by the Union, Williamson was reinstated 2 weeks later, and his record changed to read "Disciplinary Lay-off—2 wks. without pay" (R. 181–182, 189). Williamson's discharge was alleged in the complaint to be a violation of Section 8 (3). As in the case of Fisher (*supra*, p. 9), the Board dismissed the complaint in this respect on the ground that the Union had not resorted to the arbitration machinery of the contract (R. 112).

extravagant charges against petitioner's management, Liegal's reference to Williamson as a "damned Union agitator" and his threat of disciplinary action went beyond anything justifiable by way of reply to Williamson and were directed generally against Williamson's activities as Union committeeman.[25] This interference with a Union representative's efforts to perform his duties clearly violates Section 8 (1) of the Act. *North Whittier Heights Citrus Assn.* v. *N. L. R. B.*, 109 F. (2d) 76, 78 (C. C. A. 9), cert. denied 310 U. S. 632; *Fort Wayne Corrugated Paper Co.* v. *N. L. R. B.*, 111 F. (2d) 869, 874 (C. C. A. 7); *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. (2d) 452, 456 (C. C. A. 7), cert. denied 317 U. S. 650.

Petitioner's treasurer, William Shanahan, who had supervision over the timekeepers (R. 714), repeatedly interfered with Union committeemen in the performance of their duties. While serving as temporary committeeman for the timekeepers, employee Condon presented to Shanahan the grievance of one Hardman, who was about to be transferred to another department and wished to have his current wage review considered in the timekeeping department where he could profit by his seniority, rather than in his new department (R. 163–164). Shanahan told Condon that if a grievance was filed, Hardman would be "terminated," not transferred, and warned Condon that anyone who tried to do anything about the case "was liable to get into trouble" (R. 164, 731–733).

Shanahan showed his resentment toward employee Shannon, Union committeeman for the timekeepers,

[25] Petitioner's representatives have not been reluctant to make similar charges, see p. 9, *supra*.

because Shannon was not satisfied with a number of proposed individual wage increases, with the result that such cases were referred to the joint wage review committee for decision (R. 480–481, 719–722, 725–726). Shanahan told Shannon that he could not deal with him, warned him to stay out of certain departments where his duties as committeeman required him to go, and even urged him to "drop the whole thing or get out of the department" (R. 467–468, 470–471, 474–475). By restricting Shannon's access to other employees (*N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 251, 252; *F. W. Woolworth Co.* v. *N. L. R. B.*, 121 F. (2d) 658, 660 (C. C. A. 2)) and otherwise opposing his efforts to perform his duties as union committeeman, petitioner engaged in interference, coercion, and restraint within the meaning of Section 8 (1) of the Act. See cases cited, *supra*, p. 22.[26] While Shannon doubtless pressed the wage demands of union members more assiduously than those of nonunion men, there is nothing in the record to support petitioner's contention (Brief, pp. 50–53) that Shanahan's remarks and conduct were occasioned by Shannon's discrimination against nonunion men.

Petitioner also interfered in matters of union administration which were of concern only to the Union, and by questioning employees and threatening their demotion attempted to procure their withdrawal from

[26] That Shannon may have mistakenly asked excessive wage increases for employees furnishes no excuse for petitioner's conduct, for the Act's protection obviously cannot be made to depend upon any nice calculation of the correctness of union demands. Cf. *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. (2d) 452, 457 (C. C. A. 7), cert. denied 317 U. S. 650.

the Union. Thus, upon his promotion to the position of assistant foreman, in which he was still eligible for union membership, H. M. Prior asked the Union to issue him a withdrawal card, which under standard trade union practice would carry with it certain reinstatement privileges (R. 312–313).[27] Under the Union constitution, withdrawal cards could be issued only to those supervisors who attained the rank of general foreman (R. 319–320). Accordingly, the Union refused Prior's request but informed him that he was at liberty to drop his membership if he chose (R. 313). Labor Relations Director Wiseman heard of the incident and on February 20, 1942, wrote the Union demanding that it immediately issue Prior a withdrawal card (R. 310–311). The issuance of withdrawal cards was obviously a matter of union administration in which petitioner had no legitimate interest and should not have interfered.

The contract between petitioner and the Union covered "all hourly-paid employees and salaried inspectors (except supervisory inspectors and confidential clerks)" (R. 426). Under the Union's constitution, certain other classes of employees were eligible to belong to the Union (R. 320).[28] Petitioner made and attempted to enforce the unwarranted claim that employees not covered by the contract should be excluded from membership in the Union. Thus in June

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[27] See, e. g., Waldo R. Browne, *What's What in the Labor Movement*, p. 558.

[28] See United States Department of Labor, Bureau of Labor Statistics Memorandum No. 7, *Union Membership and Collective Bargaining by Foremen*, April 1943, p. 13; 12 L. R. R. 424.

1942, petitioner transferred to its administrative salaried pay roll a number of hourly-paid Union employees without changing the nature of their jobs (R. 242). The transfer apparently took these employees out of the unit covered by the contract (R. 426). When the Union objected, its representative was told that the action was taken in accordance with the policy expressed in a confidential memorandum which C. W. Perelle, petitioner's vice president in charge of production, sent to several of petitioner's officials (R. 245–248). The memorandum read as follows:

> Attached you will find a list of names of people who are a part of your supervision, who are on the salary payroll, and who are still paying dues to the Union. Obviously, this is contrary to our policy.
>
> It will be necessary for you to discuss with these individuals their wishes concerning their status as supervisory personnel, or their remaining a part of the Union set-up. They cannot do both. If the individual does not desire to discontinue his affiliation with the Union, he certainly cannot be permitted to retain his present position, but must be transferred back to a job commensurate with his ability and attitude concerning membership in the Union (R. 248).

Petitioner's reclassification of employees to take them out of the bargaining unit is obviously not explained or justified by the memorandum, the issuance of which was still another act of interference. Thus, in execution of petitioner's policy of restricting Union membership to the class of employees covered by the

contract, the memorandum directed that employees be questioned concerning their Union affiliation and "attitude concerning membership in the Union" and demoted unless they discontinued their affiliation with the Union. Both the questioning [29] and the threat of demotion [30] constituted interference, coercion, and restraint within the meaning of Section 8 (1) of the Act. Although these employees may have had supervisory status [31] and been outside the plant bargaining unit [32] they were none the less entitled to the protection of the Act against coercion and discrimination.[33]

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[29] *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518; *N. L. R. B.* v. *Hearst*, 102 F. (2d) 658, 662 (C. C. A. 9); *N. L. R. B.* v. *Bank of America*, 130 F. (2d) 624, 629 (C. C. A. 9), cert. denied 63 S. Ct. 992.

[30] *N. L. R. B.* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 493–494 (C. C. A. 9), cert. denied 306 U. S. 643.

[31] *N. L. R. B.* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 493–494 (C. C. A. 9), cert. denied 306 U. S. 643; *N. L. R. B.* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667, 671 (C. C. A. 8); *Eagle-Picher Mining & Smelting So.* v. *N. L. R. B.*, 119 F (2d) 903, 911 (C. C. A. 8).

[32] *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 23 (C. C. A. 9).

[33] It may be conceded that because an employer may be held responsible for unfair labor practices committed by supervisory employees he has a legitimate interest in preventing such employees from using their authority to influence their subordinates in their union affiliation or activity. Employer action directed specifically to that end is proper, as the Board has recognized. *Matter of Marshall Field & Co.*, 34 N. L. R. B. 1, 15–16; *Matter of Sherwin-Williams Co.*, 37 N. L. R. B. 260, 280. Petitioner here, however, has not claimed that its action was so motivated. There is no suggestion that Union membership of employees outside the contractual unit had caused, or was likely to cause, any difficulty, and it is clear that petitioner's objection to their Union membership was not so limited but was in fact founded on the broad and untenable position that it had the right to restrict Union membership to the employees covered by the contract.

Thus, while repeatedly taking unilateral action in derogation of the Union's representative status (*supra,* pp. 4–16), petitioner, acting through its supervisory officials, offered threats and inducements to procure employees' withdrawal from membership in the Union and activity on its behalf, and otherwise interfered in the affairs of the Union. The Board was fully warranted in finding, as it did, that petitioner thereby interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act.

Point II

The Board's order is valid and proper

Having found that petitioner had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, the Board was empowered to make an appropriate remedial order in the public interest (Section 10 (c)) (29 U. S. C. Sec. 160 (c)), notwithstanding the existence of a contractual or other remedy for the enforcement of private rights (*N. L. R. B.* v. *Newark Morning Ledger Co.,* 120 F. (2d) 262 (C. C. A. 3); Section 10 (a) (29 U. S. C. Sec. 160 (a)).

The order requires petitioner to cease and desist from the unfair labor practices found and to post appropriate notices. Since petitioner has not only interfered with its employees' efforts to bargain collectively but has also by various methods, including threats of demotion and discharge, interfered with the right of self-organization in circumstances from

which the Board could find the threat of continuing and varying efforts to obtain the same end in the future, the general cease-and-desist order is proper. *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426; cf. *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. (2d) 652, (C. C. A. 9). The notice provision is in the form approved by the Supreme Court in the *Express Publishing Co.* case, 312 U. S. 426, 439.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue denying the petition to review and set aside the Board's order, and granting enforcement of the order in full.

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SEPTEMBER 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*), are as follows:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
>
> * * * * *
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), * * * and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1943